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MICHAEL RODAK, J

In the Supreme Court of the United States

October Term, 1972
No. 71-6316

ANDREW C. GOOSBY et al.,
Petitioners

v.

MAURICE OSSER et al.,
Respondents

BRIEF FOR RESPONDENTS COMMONWEALTH OF PENNSYLVANIA, J. SHANE CREAMER, AND C. DeLORES TUCKER

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CODE:

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TEXT:

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ARGUMENT

I. PLAINTIFFS' COMPLAINT RAISES SUBSTANTIAL FEDERAL QUESTIONS

This case presents the issue of whether persons detained in jail prior to trial or conviction of suspected crimes may constitutionally be deprived of the right to vote. The Court of Appeals below held that in light of *McDonald vs. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969), this issue does not present a substantial federal question which must be tried before a three-judge federal court.

The Attorney General of the Commonwealth of Pennsylvania, representing himself and the Secretary of the Commonwealth as respondents, must respectfully disagree with the Court of Appeals. This case raises an important question concerning a fundamental constitutional right. The decision of this Court in *McDonald,* supra, is by its very terms a narrow one which in no way disposes of the contentions raised by the petitioners.

Although in *McDonald* this Court rejected the claim of pretrial detainees that they were being unconstitutionally deprived of their right to vote, the Court placed much emphasis in its opinion on the fact that the Illinois statutes "specifically disenfranchise only those who have been convicted and sen-

tenced", 394 U.S. at 808, and that there was nothing in the record to show that the plaintiffs were in fact absolutely prohibited from voting by the state. *Id.* at 807, 808. In addition, the Court found there that the distinctions drawn between those who could vote and those who could not were not drawn on the basis of wealth or race. *Id.* at 807.

Petitioners in this case, by contrast, have alleged and offered to prove that the absolute prohibition of the vote and the distinctions based on wealth and race, absent in *McDonald,* are present here. Petitioners point to Section 102(y) of the Pennsylvania Election Code, 25 P.S. §2602(y), which states that an *"absentee elector" shall not include "any person* committed to or *confined in a penal institution".* (Emphasis added.) They have described in detail their unavailing efforts to secure the means to vote.

The differences between what petitioners allege in this case and what was found in *McDonald* are constitutionally of great moment. On those differences turns the question of whether the "rational purpose" test is applied to the statutes involved, or whether the more exacting "compelling state interest" test is applied. *McDonald,* supra, 394 U.S. at 806-807.* Obviously, the test applied may affect the result.

Respondents reiterate their view that under the compelling state interest test the Pennsylvania Elec-

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* See also, *Carrington vs. Rash,* 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965); *Harper vs. Virginia Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); *Reynolds vs. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

tion Code fails to pass constitutional muster. Not only is there no compelling state interest in denying unconvicted prisoners their fundamental right to vote, but respondents cannot conceive of *any* state interest affected or *any* rational purpose served by denying this class of person the ballot.

It cannot be stressed too much that the persons whose rights are involved here are merely incarcerated *pending trial.* They are untried, unconvicted and, therefore, innocent in the eyes of the law. The Commonwealth does, of course, have an interest in either incarcerating suspects or releasing them on bail pending trial. In view of the fundamental presumption of innocence, however, the restrictions on the civil rights of such pretrial detainees should be limited to those necessary to assure their presence at the trial. Denial of the right to vote does not serve that or any other interest. As the Court said in *Butler v. Crumlish,* 229 F. Supp. 565, 567 (E.D. Pa. 1964):

> "The constitutional authority for the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."

It is difficult to imagine, moreover, how allowance of registration or voting by mail by unconvicted persons would disrupt or hamper the administration of jails or the election process. In any event, this is a matter on which evidence would have to be taken and findings of fact made.

It is respectfully submitted, therefore, that petitioners have presented a substantial federal question and should be permitted to present their case on the merits to a three-judge district court.

II. THIS MATTER PRESENTS A JUSTICIABLE CASE OR CONTROVERSY

The District Court, in dismissing the complaint, gave as its sole reason the fact that the Deputy Attorney General representing the Commonwealth conceded that, in the Attorney General's view, the statutes denying the right to vote to unconvicted detainees were unconstitutional under the Fourteenth Amendment to the United States Constitution. In the District Court's view this concession meant there was no case or controversy before it.* The District Court made an egregious error.

The Attorney General and the Secretary of the Commonwealth are not the only defendants in this case. The City Commissioners of Philadelphia, the Voting Registration Supervisor, the Registration Commission, and the Superintendent of Prisons for Philadelphia County are also parties. These parties have contested vigorously the issues raised by petitioners

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* Contrary to petitioners' argument, respondents do not agree that the Court of Appeals affirmed on this point. In reaching the "substantial federal question" issue, as it did, the Court of Appeals seems to have implicitly passed the threshold question of whether there was a case or controversy and thus jurisdiction.

both in the District Court and on appeal. They have provided adversity of interest, and will sharply define the issues, to the extent they are not already clear.

Even in the absence of the other adverse parties, however, the ruling of the District Court was erroneous. Under *Re Metropolitan Railway Receivership*, 208 U.S. 90, 28 S. Ct. 219, 52 L. Ed. 403 (1908), and *Walling v. Helmerich and Payne, Inc.*, 323 U.S. 37, 65 S. Ct. 11, 89 L. Ed. 29 (1944), the District Court was required to retain jurisdiction to either frame the relief to be granted or to approve a consent order.

Neither the concession made by respondents below nor the concessions made herein on appeal operate to deprive a court of jurisdiction. To the contrary a court is required to review the record and to reach its own determination. In *Young v. United States*, 315 U.S. 257, 258-259, 62 S. Ct. 510, 86 L. Ed. 832 (1942), this Court ruled that:

> The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.

See also *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); *Cates v. Henderson*, 342 U.S. 804 (1951); Stern & Gressman, *Supreme Court Practice*, 224-225 (4th ed. 1969).

CONCLUSION

For the foregoing reasons, respondents J. Shane Creamer, Attorney General of the Commonwealth of Pennsylvania, and C. DeLores Tucker, Secretary of the Commonwealth of Pennsylvania, respectfully submit that the judgment, opinion and decree of the Court of Appeals should be reversed and the case should be remanded to the District Court for the convening of a three-judge court to hear the merits of plaintiffs' claim.

Respectfully submitted,

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